Supreme Court, U.S.
FILED
AUG 18 2000
CLERK

(3)

No. 00-0034

IN THE

Supreme Court of the United States

GAMBLERS SUPPLY MANAGEMENT CO. AND SODAK GAMING IOWA INC., A/K/A SODAK GAMING, INC.,

Petitioners

v.

BYRON P. CLEMENTS AND MARK W. CLEMENTS,

Respondents

On Petition For Writ Of Certiorari
To The Supreme Court of Iowa

REPLY BRIEF

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CORPORATE DISCLOSURE (RULE 29.6)

Sodak Gaming, Inc. is a wholly owned subsidiary of International Game Technology, which is a publicly traded company on the New York Stock Exchange.

Gamblers Supply Management Company has been merged into Isle of Capri Marquette, Inc., which is a wholly owned subsidiary of Isle of Capri Casinos, Inc. Isle of Capri Casinos, Inc. is a publicly traded company on the NASDAQ.

There are no other publicly traded corporations which own more than a ten percent share in either Sodak Gaming, Inc. or Gamblers Supply Management Company.

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STATEMENT OF THE CASE - REPLY

In their Opposition Brief to the Petition for Writ of Certiorari, Respondents make much of the fact that Petitioners operate a casino vessel, that the vessel left the dock only a minimum number of times per year, and that Respondents had some "non-maritime" job duties. (Opposition Brief, p. 1) These assertions, however, go to the issue of whether this should be considered a maritime cause of action, an issue that has not been appealed to this Court.

Pursuant to United States Supreme Court Rule 12.5, Respondents were afforded the opportunity to file a Cross Petition for Writ of Certiorari on the issue of whether this is a maritime cause of action. Respondents, however, failed to file such a Cross Petition. As a result, the Iowa Supreme Court's holding that maritime law applies to casino vessels operating on the inland waters of the Mississippi stands as the law of the case.

The real issue before this Court is whether the Iowa Supreme Court improperly interfered with the uniformity of substantive federal maritime law when it failed to apply three federal courts of appeals decisions directly on point to the issue of a wrongful termination action by a maritime employee allegedly fired for refusing to violate a safety statute.

Based on the arguments set out in the Petition for Writ of Certiorari, and based on the responsive arguments set out below, Respondents ask this Court to grant its Petition for Writ of Certiorari.

ARGUMENT

I. RELIANCE ON ELLENWOOD V. EXXON SHIPPING CO., 984 F.2d 1270 (1st Cir. 1993) IS COMPLETELY MISPLACED BECAUSE IT DID NOT ADDRESS THE ISSUES IN THIS CASE AND ELLENWOOD DID NOT OVERRULE THE HOLDINGS OF FEEMSTER, GARRIE, OR MEAIGE.

Petitioners come before this Court continuing to rely on the Fourth and Fifth Circuit Courts of Appeals decisions in Meaige v. Hartley Marine Corp., 925 F.2d 700 (4th Cir. 1991), cert. den. 501 U.S. 1217, 111 S. Ct. 2826 (1991); Garrie v. James L. Gray, Inc., 912 F.2d 808 (5th Cir. 1990), cert. den., 499 U.S. 907, 111 S. Ct. 1108 (1991); Feemster v. BJ-Titan Services Co./Titan Services, Inc., 873 F.2d 91 (5th Cir. 1989). These cases are directly on point and hold that no cause of action exists for wrongful termination when a maritime employee is fired for refusing to violate a safety statute.

In their Brief in Opposition, Respondents rely heavily, as the Iowa Supreme Court did, on Ellenwood v. Exxon Shipping Co., 984 F.2d 1270 (1st Cir. 1993).

Respondents assert that Ellenwood is the most recent court of appeals decision on point and that Ellenwood is directly contrary to Petitioners' position. (Brief in Opposition, p. 4) For several reasons, that assertion is untrue.

First, it must be noted that Ellenwood does not even address the issue of whether a maritime employee has a cause of action for wrongful termination when the employee is fired for refusing to violate a safety statute. Ellenwood is a **handicap discrimination** case which fails to even mention Feemster, Garrie, or Meaige anywhere in the opinion. In other words, Ellenwood fails to address the very issue that is before this Court. This is not apparent in Respondents' Brief, however, as Respondents failed to include a factual analysis of Ellenwood for this Court's review. Respondents chose instead to simply extract quotations as needed to bolster their argument without presenting the facts that show that Ellenwood has no application in this case.

Second, in Ellenwood the First Circuit was faced with the issue of whether a state law claim could be used in a maritime case where **maritime law had not previously addressed handicap discrimination**. Id. at 1278. The First Circuit held that where maritime law has not addressed a particular issue, state law may supplement maritime law. However, **where maritime law is clearly stated on an issue, as is the case here**, state law cannot contradict maritime law.

Prior to appeal, the federal district court in Ellenwood held that because maritime law had not expressly addressed the issue of handicap discrimination, no such cause of action could be brought under maritime law. The federal district court stated in its ruling: "I am not aware of any basis under maritime law for such recovery" and subsequently held that none existed, dismissing the employee's cause of action. Id.

On appeal, the First Circuit overruled the district court's decision, holding that the lower court had overestimated the preempted power of maritime law. Id. In doing so, however, the court stated:

> **"[W]e have been shown nothing in substantive maritime law that is even potentially at odds with state human rights statutes such as those underlying Count IV of Ellenwood's complaint (wrongful discharge in violation of public policy)."**

Id. at 1280 (emphasis added). The First Circuit held that state law can be used to supplement maritime law where **maritime courts have never addressed the issue**.

Factually, this is not the case here. In the present case there are three federal courts of appeals decisions directly on point which have addressed the issue and held that maritime law does not recognize a cause of action for wrongful termination under the facts of this

case. As a result, there is clearly substantive maritime law holding against Respondents' position.

Third, Ellenwood does not, as Respondents assert, overrule Feemster, Garrie, or Meaige. In fact, the First Circuit in Ellenwood even acknowledged that under certain circumstances, state law will be deemed preempted by federal law:

> "[I]n areas where Congress has not entirely displaced state regulation, **state law will be deemed preempted to the extent it actually conflicts with federal law**."

Id. at 1274, quoting California Federal Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 281, 107 S.Ct. 683, 689, 93 L.Ed.2d 613 (1987) (emphasis added)(quotations omitted).

The decisions rendered by the Fourth and Fifth Circuits in Feemster, Garrie, and Meaige constitute a binding body of federal maritime law directly on point which is neither contradicted nor called into question by Ellenwood. This body of law should have been relied upon by the Iowa Supreme Court to affirm the grant of summary judgment. Failure to do so has created a conflict with the existing federal maritime law which must be addressed by this Court. See e.g., California Federal Savings, 479 U.S. at 281.

II. EVEN IF ELLENWOOD IS VIEWED AS BEING CONTRARY TO FEEMSTER, GARRIE, AND MEAIGE, A CONFLICT EXISTS BETWEEN THE CIRCUITS THAT MUST BE RESOLVED BY THIS COURT.

Even if this Court were persuaded that the First Circuit in Ellenwood reached a decision that is contrary to the holdings from the Fourth and Fifth Circuits in Feemster, Garrie, and Meaige, then there is even more reason for this Court to grant the Petition for Writ. United States Supreme Court Rule 10(a) indicates that certiorari can be granted when a federal court of appeals has rendered a decision that is in conflict with the decision of another federal court of appeals. If Respondents' position is taken as true, Rule 10 applies in that a conflict exists between the circuits that must be addressed by this Court.

The same can be said for the other case law cited by Respondents which they assert is contrary to Feemster, Garrie, and Meaige. While none of the authority cited by Respondents overrules the three most important cases at issue here, Feemster, Garrie, and Meaige, Respondents argue that the case law indicates that they were wrongly decided. At the very most, the cases relied on by Respondents, including cases from the First Circuit Court of Appeals, do nothing more than demonstrate that a conflict may exist in the circuits as to the preemptive effect of substantive federal maritime law.

While none of the federal decisions cited by Respondents are on appeal to this Court, if this Court believes the case law cited by Respondents is truly contrary to Petitioners' position, a conflict does exist between the Fourth, Fifth and First Circuit Courts of Appeals which should be laid to rest by the granting of this Petition for Writ.

III. THE REMAINING CASE LAW RELIED ON BY RESPONDENTS DOES NOT JUSTIFY THE IOWA SUPREME COURT'S IMPROPER INTERFERENCE WITH SUBSTANTIVE FEDERAL MARITIME LAW.

In their Brief in Opposition, Respondents have also placed a great deal of weight on this Court's holding in Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 116 S.Ct. 619, 133 L.Ed. 578 (1996). Respondents assert that this decision "clearly demonstrates that Meaige was incorrectly decided." (Brief in Opposition, p. 15) This case, which permitted use of a state law for relief in a wrongful death action, again does not overrule, or even contradict, Feemster, Garrie, or Meaige.

In Yamaha, this Court addressed the very narrow issue of the application of civil state tort remedies to a **nonmaritime civilian** who was killed in a tragic jetski accident. In doing so, this Court **expressly limited** its holding to cases which involve **wrongful death actions of non-seaman**:

> "We attempt no grand synthesis or reconciliation of our precedent today, but confine our inquiry to the modest question whether it was Moragne's design to terminate state remedies when **non-seafarers** meet death in territorial waters."

Id. at 210, n. 8 (emphasis added). In addition the court noted:

> "Traditionally, state remedies have been applied in accident cases of this order - maritime wrongful death cases in which no federal statute specifies the appropriate relief **and the decedent was not a seaman, longshore worker, or person otherwise engaged in maritime trade."**

Id. at 200 (emphasis added).

This Court in Yamaha acted to preserve a civilian's claim for wrongful death. In doing so, it expressly limited its holding to wrongful death cases brought by non-seamen. It is distinguishable not only because of its limited holding, but because the Fourth and Fifth Circuits have already specified the appropriate relief and indicated why no cause of actions exists for seamen who raise claims for wrongful termination.

Nothing in this Court's holding in Yamaha indicates a belief that state law can be given effect in a maritime case when it directly contradicts federal

maritime law. In Yamaha, this Court simply opened up state law in cases of wrongful death where **there is no federal statute and the decedent is not a maritime employee**. This is not the same case here and the holdings of Feemster, Garrie, and Meaige should be recognized and preserved.

Respondents also err in their reliance on other case law from other circuits. Both Respondents and the Iowa Supreme Court relied on Smith v. Atlas Off-Shore Boat Serv., Inc., 653 F.2d 1057 (5th Cir. 1981) and Seymore v. Lake Tahoe Cruises, Inc., 888 F. Supp. 1029 (E.D. Cal. 1995) to support the position that federal maritime law would recognize Respondents' cause of action. In addition, Respondents further rely on Higgins v. Smith Int'l Inc., 716 F.2d 278 (5th Cir. 1983).

First, it is important to note that Smith and Higgins were both decided by the same Fifth Circuit Court of Appeals that decided Feemster and Garrie. More importantly, Feemster and Garrie were decided several years after Smith and Higgins and the Fifth Circuit still refused to recognize Respondents' cause of action. In fact, in Feemster, **the Fifth Circuit expressly limited Smith to cases where a seaman is fired for bringing a personal injury suit against his employer.** Id. at 93. In other words, Feemster, a case decided nine years after Smith by the same Fifth Circuit Court of Appeals, **refused to expand Smith** to include cases where a seaman is fired for refusing to violate a safety statute.

Second, the Seymore case from Eastern District

of California federal circuit court involved a maritime employee fired for refusing to violate a statute, where violation of the statute would have subjected him to felony criminal sanctions under 46 U.S.C. § 10908. That district court was cognizant of the need to preserve Feemster, and distinguished itself by relying on the fact that Seymore involved criminal statutes. In addition, the Seymore case was never appealed and, as such, it is not binding on the federal courts of appeal.

Respondents rely heavily on case law that neither contradicts nor even addresses the issues raised by the Fourth and Fifth Circuits in Feemster, Garrie, and Meaige. This is the same mistake that was made by the Iowa Supreme Court in ignoring the binding precedent of federal maritime case law. Petitioners now ask this Court to grant its Petition for Writ so that they may be heard on this issue.

Respectfully submitted,

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